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The uncertainty of litigation is well illustrated by the final result of the case of State v. Withrow in the Supreme Court of Missouri, to which we called attention in a recent issue (42 Cent. L. J. 191) at the time the opinion of division No. 1 of that court was rendered. Thereafter the case went to the court *in banc* which has just reversed the decision of division No. 1 and awarded the writ of prohibition. The interesting part of the history of this case is that there is but one dissenter—Judge Barclay,—in the court sitting *in banc*, though at the hearing in division No. 1 two of the judges reached a conclusion directly opposed to that to which they now assent. However there is nothing to prevent a judge from changing his mind especially in reference to a question so susceptible of two opinions as was this case. It involved the power of the circuit judges of the city of St. Louis to make rules governing the selection of "special juries" which, as was claimed by those who opposed the rules, in effect abolished such juries except in name, and were in derogation of the statute providing for special juries and of the State constitution. Division No. 1 however did not so think. It was there held that the circuit judges had full power to frame rules governing the selection of special juries, and that an order of court requiring the jury commissioner to draw and furnish a special venire of "good and lawful men" without other designation of qualifications was valid. The court *in banc* however reached a different result. They argue that "special juries," as distinct from a common jury, were a feature of the common law and that our legislature, by adopting it, must be presumed to have done so with a full understanding of the meaning, force and effect "which that expression had acquired during its long sojourn at common law," that the constitutional guarantees as to trial by jury means that all the substantial incidents and consequences which pertained to the right of trial by jury are beyond the reach of hostile legislation, and that, therefore, it is neither in the power of law makers nor courts to take away the right to a special jury or by the operation of rules force a litigant who lawfully asks for such a panel to accept anything else. Though the opinion of the court by Judge Sherwood is learned, exhaustive of the precedents and very plausible, it is not entirely convincing. While it is concededly beyond the power of courts to make rules in derogation of statutory or organic law, and though a certain kind of special jury was undoubtedly known to the common law, it is not clear that the rules adopted by the circuit judges in this case, regarding the manner of providing a "special jury" were beyond their jurisdiction.

Not long ago the Supreme Court of California reversed a case upon the ground of undue interference by the trial judge with the verdict of the jury. Mahoney v. San Francisco & San Mateo Ry. Co., 42 Pac. Rep. 969. The error consisted in language used by the court in the course of supplementary instructions to the jury which in effect compelled them to agree to a verdict. The recent case of State v. Kelley, 24 S. E. Rep. 45, was reversed by the Supreme Court of South Carolina upon the ground that the verdict was obtained through duress on the part of the court. It appeared that a jury in a prosecution for assault with intent to kill retired about 4 o'clock P. M., with the usual instructions about bringing in a sealed verdict. They were furnished with supper, and with breakfast the next morning. The sheriff was then instructed to give them nothing more to eat, and they remained in the room until about 7 o'clock P. M. of the second day. They then came in at the direction of the judge, who, learning that their disagreement was one of fact, sent them back to the jury room, and some time during the night they rendered a sealed verdict. Before retiring the second time, the foreman said: "We have been in the room twenty-four hours and can't agree." It also appeared that on three separate occasions the jury had attempted, through the officer in charge, to communicate to the judge that they could not agree, and wished to be discharged. The recalcitrant member or members of the jury, under such duress of starvation, not unnaturally finally consented to a verdict, and the appellate court very properly holds, not only

that the jurors themselves had good grounds for complaint, but that a verdict rendered under such circumstances must be set aside and a new trial ordered.

NOTES OF RECENT DECISIONS.

WILL—ATTESTATION—ERRONEOUS NAME.—It was held by the Supreme Court of California in *Re* Walker's Estate, 42 Pac. Rep. 815 that where a witness, in attesting a will, inadvertently wrote the surname of the testator instead of his own, there was no sufficient compliance with Civ. Code, § 1276, providing that each of the attesting witnesses must sign his name at the end of the will. The court was somewhat divided on the question, three of the members dissenting. The opinion of the court by Henshaw, J., contains an exhaustive review of the English authorities.

OFFICERS—DE FACTO OFFICERS—ELECTION UNDER UNCONSTITUTIONAL LAW—COLLATERAL ATTACK.—The Supreme Court of Ohio decide, in State v. Gardner, 42 N. E. Rep. 999, that the official acts of public officers, in an office created by an unconstitutional statute of this State, performed before the statute has been declared unconstitutional by an authoritative decision of the courts of the State, cannot be collaterally attacked. Different courts have decided this question differently. Lynch v. People, 122 Ill. 420, 12 N. E. Rep. 726; Burt v. Railroad Co. (Minn.), 18 N. W. Rep. 285; Coyle v. Com., 104 Pa. St. 117; Mechem, Pub. Off., §§ 318, 327; Van Fleet, Collat. Attack, p. 33, § 21; Norton v. Shelby Co., 118 U. S. 425, 6 Sup. Ct. Rep. 1121; Hildrith's Heirs v. McIntire's Devisees, 1 J. J. Marsh, 206. The question was before the Ohio court for the first time. Bradbury, J., in announcing the decision of the court says that "while not insensible to the consideration justly due to the high standing of those courts and authors, we are bound to reach that conclusion which, in our judgment, is best sustained by sound reason, and that best comports with an enlightened public policy and the maintenance of public order." Spear, J., concurred in an opinion exhaustively reviewing the following authorities in addition to those cited above: People v. Weber, 86 Ill. 283; Brown v. O'Connell, 36 Conn. 432; Smith v. Linch, 29 Ohio St. 261; Clark v. Com., 29 Pa. St. 129; Campbell v. Com., 96 Pa. St. 344; State v. Brooks, 39 La. Ann. 817; *Ex parte* Strange, 21 Ohio St. 610. Shauck, J., dissented.

CONSTITUTIONAL LAW—POLICE POWER.—In People v. Smith, 66 N. W. Rep. 382, decided by the Supreme Court of Michigan, it was held that a statute requiring emery wheels used as machinery to be provided with blowers to carry away the dust arising from their operation, is not unconstitutional as class legislation, but valid as a police regulation for the benefit of the public welfare. The court said in part:

The case of People v. Warden of City Prison, 144 N. Y. 529, 39 N. E. Rep. 686, is an interesting one upon this question, and although the decision there laid down is criticised (perhaps justly) by Mr. Justice Peckham in a dissenting opinion, concurred in by two of his associates, the power to regulate private affairs where the public necessity exists is asserted in an exhaustive opinion by the same learned judge in the case of Health Department of New York v. Rector, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. Rep. 833, in the course of which the power to regulate the appliances for manufacturing is asserted. 145 N. Y. 43, 44, 39 N. E. Rep. 833. The opinion says: "Hand rails to stairs, hoisting shafts to be inclosed, automatic doors to elevators, automatic shifts for throwing off belts or pulleys, fire escapes on the outside of certain factories, all these were required by the legislature from such owner, and without any direct compensation to him for such expenditure. Has the legislature no right to enact laws such as this statute regarding factories, unless limited to factories to be thereafter built? Because the factory was already built when the act was passed, was it beyond the legislative power to provide such safeguards to life and health, as against all owners of such property, unless upon the condition that these expenditures to be incurred should ultimately come out of the public purse? I think to so hold would be to run counter to the general course of decisions regarding the validity of laws of this character, and to mistake the foundation upon which they are placed." The trouble with these cases arises over the inability of the courts to fix a rigid rule by which the validity of such laws may be tested. Each law of the kind involves the questions: (1) Is there a threatened danger? (2) Does the regulation invade a constitutional right? (3) Is the regulation reasonable? In the present case no controversy is raised over the first of these. Hence we are not called upon to discuss it. As is implied by what has been said, the constitutional right to use property without regulation is plain, unless the public welfare require its regulation. If the public welfare does require it, the right must yield to the public exigency. And it is upon this question of necessity that the third question depends. All, then, seems to be embraced in the question of necessity. Unless the emery wheel is dangerous to health, there is no necessity, and consequently no power, to regu-

late it. Unless the blower is a reasonable and proper regulation, it is not a necessary one. Who shall decide the question, and by what rule? Shall it be the legislature or the courts? And, if the latter, is it to be determined by the evidence in the case that happens to be first brought, or by some other rule? Does it become a question of fact to be submitted to the jury or decided by the court? Of all the devices known to human tribunals, the jury stands pre-eminent in its ability to determine cases in direct violation of and contrary to law, without impairing the binding force of the law as a rule of future action. We have known of instances where question of the constitutionality of the acts, as applied to the particular case on trial, has been made to depend upon the finding of the jury upon the facts in the case. But there is a manifest absurdity in allowing any tribunal, either court or jury, to determine from testimony in the case the question of the constitutionality of the law. Whether this law invades the rights of all the persons using emery wheels in the State is a serious question. If it is a necessary regulation, the law should be sustained, but, if an unjust law, it should be annulled. The first case presented might show by the opinions of many witnesses that the use of the dry emery wheel is almost necessarily fatal to the operative, while the next might show exactly the opposite state of facts. Manifestly, then, the decision could not settle the question for other parties, or the fate of the law would depend upon the character of the case first presented to the court of last resort, which would have no means of ascertaining whether it was a collusive case or not, or whether the weight of evidence was in accord with the truth. It would seem, then, that the questions of danger and reasonableness must be determined in another way. The legislature, in determining upon the passage of the law, may make investigations which the courts cannot. As a rule, the members (collectively) may be expected to acquire more technical and experimental knowledge of such matters than any court can be supposed to possess, both as to the dangers to be guarded against and the means of prevention of injury to be applied; and hence, while under our institutions the validity of laws must be finally passed upon by the courts, all presumptions should be in favor of the validity of legislative action. If the courts find the plain provisions of the constitution violated, or if it can be said that the act is not within the rule of necessity in view of facts of which judicial notice may be taken, then the act must fall otherwise it should stand. Applying this test, we think the law constitutional, and the judgment is therefore affirmed. The other justices concurred.

DURESS—SETTLEMENT OF DISPUTE.—The Court of Civil Appeals of Texas decides, in Alexander v. Trufant Com. Co., 34 S. W. Rep. 182, that the fact that a creditor would be unable to continue his business unless payment for grain shipped the debtor should be promptly made, as provided in the contract of sale, of which fact the debtor was aware at the time of the sale, does not render a settlement of a dispute between them as to the grade of the grain, entered into by the creditor to secure prompt payment, invalid for duress. The court says:

If the defendant in error violated its contract under which the grain was shipped, the plaintiff in error had a remedy at law by which he could have enforced his rights and redressed his wrongs. He was a free man, with the courts of his country opened to him, without restraint, either actual or constructive, nor threatened either in life, limb, liberty or property, dealing with one who had not even the semblance of power to harm him, when he entered into the contract by which he says he was so greviously wronged. Courts in this country are not wont to lend a willing ear to the complaints of a man who shows that he has, for the purpose of obtaining a part of what is due him, voluntarily yielded his rights to one who has no power to harm him. If such complaints were favorably entertained, the man who has the courage to stand up for and maintain his rights would be placed at a serious disadvantage by any truckler who might choose to make them against him in our courts. We cannot better express our views on this point than by quoting the language used by Mr. Justice Cooley in a similar case. He says: "In what did the alleged duress consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money, and might be financially ruined in case he failed to obtain it. It is not pretended that Hackley & McGordon had done anything to bring Headley to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment, except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendants' conduct, but by the plaintiff's necessities. The same contract, which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous, as well as a most unequal, doctrine; and if accepted no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need." Hackley v. Headley, 45 Mich. 569, 8 N. W. Rep. 514. And of Mr. Justice Harlan in U. S. v. Silliman, 101 U. S. 465-471, when he says: "Instead, however, of seeking the aid of the law, claimants, with a full knowledge of their legal rights, executed new charter parties, and from time to time received payments according to the rates prescribed therein; protesting, when the new agreements were signed, that they were executed against their wishes and under the pressure of financial necessity. They now seek the aid of the law to enforce their rights under the original charter parties, upon the ground that those last signed were executed under such circumstances as amounted, in law, to duress. Duress of, or in, what? Not of their persons, for there is no pretense that a refusal on their part to accede to the illegal demand of the quartermaster's department would have endangered their liberty or their personal security. There was no threat of injury to their persons or to their liberty, to avoid which it became necessary to execute new charter parties; nor were those charter parties executed for the purpose or as a means of obtaining possession of their property. They yielded to the threat or demand of the department solely because they required, or supposed they required, money for

the conduct of their business, or to meet their pecuniary obligations to others. Their duty, if they expected to rely upon the law for protection, was to disregard the threat of the department, and apply to the courts for redress against its repudiations of a valid contract. We are aware of no authority, in the textbooks or in the adjudged cases, to justify us in holding that the last charter parties were executed under duress. There is present no element of duress, in the legal acceptation of that word. The hardships of particular cases should not induce the courts to disregard the long-settled rules of law." In that case the claimants had a strong adversary, the United States, who, through the quartermaster's department, demanded that they should execute a new charter party, containing stipulations essentially different, as to compensation, from those embodied in the contracts under which the government obtained possession of the barges; and it announced its purpose to retain possession, and withhold all compensation, unless and until the claimants executed the proposed new charter parties.

TAXATION—EXEMPTION — MUNICIPAL CORPORATION — PUBLIC IMPROVEMENT — ASSESSMENT.—That property exempt from taxation is still liable for assessments for public improvements has been decided by a long line of cases, the latest of which is Yates v. City of Milwaukee (Wis.), 66 N. W. Rep. 248, wherein the following is from the opinion of the court:

In the case of Hale v. City of Kenosha, 29 Wis. 605, in considering the distinction between taxes and assessments, it was said that "assessments, as distinguished from other kinds of taxation, are those special and local impositions upon property in the immediate vicinity of municipal improvements, such as grading and paving streets, improving harbors or navigable rivers within the limits of the municipality, and the like, which are necessary to pay for the improvements, and are laid with reference to the special benefit which the property is supposed to have derived from the expenditure;" and the language of Bronson, J., in Sharp v. Speir, 4 Hill, 76, that "our laws make a plain distinction between taxes which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city or village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement," after citing the previous cases in this State on the subject, was declared to be "peculiarly applicable to our system of taxation and assessment." As such assessments are laid with reference to the special benefit which the owner of the property is supposed to have derived from the improvement, it is manifestly just that, to the extent which his property has been benefited, it should be charged with the cost of the improvement, and it would be inequitable to exempt it from such an assessment. No presumption, therefore, of an intention to exempt such property from assessment, can arise from the use of language which does not clearly show that the legislature intended such exemption, and to charge the special benefit thus derived by a private owner upon the funds raised by general taxation. While assessments are said, in strictness, to be made under the taxing power, they are "so far separated and distinguished from general taxation as to have obtained a distinct name and that name 'assessments.' As such, they have been known and described for a number of years in the older States, in their contracts, laws, and constitutions. A clear distinction between it and other taxation was established." Weeks v. City of Milwaukee, 10 Wis. 243, 244. A familiar illustration of the popular understanding is found in the language used in leases, and in those before us, where general taxes, when so intended, are named simply as "taxes;" and when assessments are intended, the words "special taxes" or "assessment" are employed to express such intent. Legislative exemptions of property from taxation are to be strictly construed. This rule is universal. Cooley, Tax'n, 54; Weston v. Supervisors, 44 Wis. 256. In pursuance of this principle, it has been generally held that a law exempting property from "taxation" does not exempt it from assessment for street improvements; that the terms "taxes" and "assessments" are not synonymous, and that the latter is not included in the former. Lima v. Cemetery Ass'n, 5 Am. & Eng. Corp. Cas. 547, and note, where the cases on the subject are collected; Winona & St. P. Ry. Co. v. City of Watertown (S. D.), 44 N. W. Rep. 1072; City of Sioux City v. Independent Dist. of Sioux City (Iowa), 7 N. W. Rep. 488; 25 Am. & Eng. Enc. Law, 160, and numerous cases cited in note 2; Worcester Agricultural Soc. v. Mayor, etc., of Worcester, 116 Mass. 189, 191; Bridgeport v. New York & N. H. R. Co., 36 Conn. 255; McClean Co. v. City of Bloomington, 106 Ill. 209; Adams Co. v. City of Quincy, 130 Ill. 566, 22 N. E. Rep. 624; Zable v. Orphans' Home, 92 Ky. 89, 17 S. W. Rep. 212; State v. Mills, 34 N. J. Law, 177; Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 506; Roosevelt Hospital v. Mayor, etc., 84 N. Y. 108; Railway Co. v. Decatur, 147 U. S. 190, 13 Sup. Ct. Rep. 293.

FRAUDULENT CONVEYANCE — PARTIAL ILLEGALITY OF CONSIDERATION.—The Supreme Judicial Court of Massachusetts decides, in Traders' Nat. Bank v. Steere, 43 N. E. Rep. 187, that the fact that a transfer by a debtor in payment of a just debt was also in consideration that the transferee should not prosecute the former for a crime, does not render the transfer subject to attack at the instance of creditors as fraudulent. The following is from the opinion of the court:

The conveyance of property by a contract which is void as being against public policy in a particular which has no reference to creditors does not necessarily give creditors a right to pursue the property after the contract has been fully executed. Such a contract may or may not be fraudulent as against creditors. If it is, they may set it aside; if it is not, they cannot. We may assume, in accordance with the decisions in Weeks v. Hill, 38 N. H. 199, and in Clark v. Gibson, 12 N. H. 386, that if an insolvent person appropriates a considerable portion of his property for his own benefit in a way forbidden by law, such an appropriation is *ipso facto* a fraud upon his creditors. Money taken by an insolvent person from his estate, and paid to compound a felony, is disposed of fraudulently as against creditors, and may be treated by them as still applicable to the payment of their debts. But the payment of one or more

creditors in full by way of preference is not fraudulent at common law. It is not a misappropriation of the debtor's property. Sawyer v. Levy, 162 Mass. 190, 38 N. E. Rep. 365. Such a payment does not become fraudulent as against creditors merely because the creditor, when he receives payment and gives up the evidence of his debt, illegally promises, as a part of the transaction, to compound a felony of which the debtor is guilty. The added illegal element in the contract is condemned by the law, because it is against public policy, but it does other creditors no harm. The money paid is no more than is due for the debt, and nothing is taken from the other creditors for an illegal use. See Bank v. Haskins, 3 Metc. (Mass.), 332-340; Harvey v. Varney, 98 Mass. 118-120. They are affected as well as all other members of the community are affected, and not otherwise. If it were possible to do so, they would have no right to use the debtor's liability to punishment for his crime as a means of obtaining an advantage to themselves. Taylor v. Jackues, 106 Mass. 291; Morse v. Woodworth, 155 Mass. 233, 27 N. E. Rep. 1010, 29 N. E. Rep. 525.

VESTING OF LEGACY — PRESUMED ASSENT OF EXECUTOR.

It is well established, that the legal title to a legacy will not vest in the legatee, without the express or implied assent of the executor. This follows from the principle, vesting the entire personal estate of the deceased testator in his executor, and the purpose of the rule is to protect creditors of the estate, and to prevent the testator from defrauding them, by bequeathing all his property, to various people who, if their rights were complete at the probate of the will, might take possession of the property to the loss of the creditors. So, that if the legatee takes possession of his legacy, without the assent of the executor, the latter can maintain trespass or trover against him, and that, although the will expressly directs that such consent shall not be necessary to the legatee's right.[1] The rule applies as well to the executor's own legacy as to that of another; though, of course, in such a case the assent, which may be either express or implied, is more often implied from the conduct or indirect expressions of the executor.[2]

Such is the rule at law. The tendency in equity is to somewhat modify it. Thus, while, as to a general legacy, such assent is, at law, a condition precedent to the legatee's right of action for the legacy, yet in equity he may proceed without such assent since in the equitable action, all the conflicting interests would be considered, and the legacy ordered paid only, if sufficient assets appeared, so rendering the assent of the executor superfluous.[3] The purpose of the rule is the protection of the estate. It is not intended that the wishes of the executor should control those of his testator. The legatee is only required to await the executor's reasonable convenience. Therefore, it is well established that, where the circumstances justify it, a court of equity will either compel the executor to assent to the legacy, in order that the legal title may vest in the legatee, or, upon the principle of regarding that as done, which, in equity and good conscience, ought to be done, will assume that the executor has already assented. Says Judge Woerner, in his American Law of Administration.[4] "If the executor unreasonably refuse his assent, relief may be obtained in equity; or it will sometimes be presumed, upon the theory that the executor has done what he ought to have done." Mr. Justice Story, in his great work on Equity Jurisprudence, discusses this subject somewhat more fully: "If the testator does not dispose of the residue of his estate, and yet, from the circumstances of the will, the executor is plainly not entitled to the residue, then he will be held liable to distribute it as a trustee for the next of kin. But the spiritual courts have no jurisdiction whatsoever to enforce a distribution for trusts are not cognizable in those courts and cannot be enforced by them. Even in the common case of a legacy of personal estate, the legacy does not vest in the legatee until the executor assents to it; and until he assents it would seem not to be suable in the spiritual courts. But courts of equity consider the executor to be a trustee of the legatee and will compel him to assent to and pay the legacy as a matter of trust."[5] The cases relied on, fully sustain the doctrine stated. In Wind v. Jekyll,[6] decided in 1719, it was said: "A de-

[1] Woerner's Am. L. Admr., § 453; Croswell's Exrs. § 490, *et seq.*; Schouler's Exrs. & Admr., § 493; Wms. Exrs. pp. (1380, 1381).

[2] Croswell's Exrs. § 492. See, also, Chester v. Greer, 5 Humph. 26, 31; Murphree v. Singleton, 3 Ala. 412, 415; Vanzant v. Bingham, 76 Ga. 759; Walker v. Walker, 26 Ala. 262.

[3] Croswell's Exrs., § 493.

[4] § 453. See, also to the same effect Schouler Exrs. v. Admrs., § 488; Wms. Exrs., p. (1375); 1 Roper's Legacies, 573.

[5] Story's Eq. Jur. § 540.

[6] 1 P. Wms. 572.

vise of a chattel interest, differs from a grant thereof, such devise vesting nothing in the devisee until the executor assents; from whence it follows, that the executor is a trustee for the legatee with respect to his legacy, and this is the only reason why a legatee may bring his bill in equity against the executor for his legacy supposing it to be a trust." Again, in Cray v. Willis,[7] decided about ten years later, where the question was as to the right of survivorship arising out of the joint-tenancy of two legatees, who were also executors, and it was important to determine whether the legacy had vested, it was said: "Besides in case of a legacy a term for years given to two, if the executors assent to the legacy, and one of the legatees dies, the legacy then will be admitted to survive, because, by consent of the executors, the legacy is to become a legal property, and consequently determinable according to the rules of the common law. Now it is not very reasonable that when the debts are all paid, (as they are in this case), the executors, delaying to give their consent to do what in equity they ought, nay, what they are compellable to do, viz.: to consent to a legacy, should defer the vesting of a legal right in a third person. But if this were so here is an implied assent: If I devise a term for years to my executor, who enters generally, he may *prima facie* take as legatee, this being more for his advantage; though it is otherwise where I devise a term to my executor for life only, with remainder to J S. Because if the term were vested in the remainder-man it could not be divested out of him again, and so might make a *devastavit*."

In Lark v. Linstead,[8] said the Maryland Chancellor, in discussing the equitable jurisdiction of legacies: "It will be found upon examining the cases cited by Judge Story in the sections just referred to, and in the case of Wind v. Jekyll,[9] that no action will lie at law to recover a legacy, until in the case of a specific legacy, the executor has assented thereto; or, in the case of a pecuniary legacy he has promised to pay it, that a court of equity regarding the executor as a trustee, will compel him to assent and pay the legacy as a matter of trust.[10] It is not, therefore necessary to inquire, in this case, whether the facts and circumstances are sufficiently strong to infer the assent of the executor to the legacy in question, as we are now in a court of equity, where, in a proper case, relief may be granted irrespective of any such assent." In Chapman v. Fenwick,[11] which was a petition by a negro for freedom under the will of his former owner, the court (Cranch, C. J.) said, p. 435: "If the emancipation be a specific legacy, and if the assent of the executor has not been given; inasmuch as the real and personal estate are both equally charged by this will; and as that fund is admitted to be sufficient without the value of the petitioners, he may be compelled to assent."[12] The general doctrine is clearly laid down in Andrews v. Hummerman.[13] "It seems to be well settled in the law, that in a specific devise of chattels, though the right vests at the death of the testator, yet the assent of the executor is necessary to enable the legatee to obtain possession. At the common law, and this founded upon the liability of the executor for debts, he has a right to refuse the legacy until he has ascertained whether there are assets. It is therefore held to be necessary to go into chancery to obtain payment of a legacy, where there will be an account and discovery of assets, and a decree of payment if those be found sufficient. Now, at the common law an action lies for a legacy on a promise to pay, there being a sufficiency of assets.[14] And trover will lie for a specific legacy after an assent of the executor.[15] An assent will be presumptive evidence of assets." In Georgia, where the plan of codification has been adopted, the principle has been embodied in the Code, 1882.[16] It is expressly provided that the executor cannot "by capriciously withholding his assent, destroy the legacy. In equity the legatee may compel him to assent."[17] This rule has been applied by the Supreme Court of Missouri in the well-considered case of

[7] 2 P. Wms. 529, 531.
[8] 2 Md. Ch. 162. See, also, Crist v. Crist, 1 Ind. 570.
[9] 1 P. Wms. 575 (*supra*).
[10] 1 Sto. Eq. Jur. § 540 (quoted above).
[11] 4 Cranch, C. C. 431.
[12] See, also, Nancy v. Snell, 6 Dana (Ky.), 143, which was another petition for freedom under a bequest of emancipation.
[13] 6 Pick. 129.
[14] Cowp. 288.
[15] 3 Atk. 223.
[16] §§ 2451, 2452, 2453.
[17] See, also, Nelson v. Cornwell, 11 Gratt. 724.

Collier's Will,[18] to a trust for the benefit of the testator's heirs. There the testator vested the residuum of his estate in trustees, to be divided among his children upon the happening of a certain event, who were then to take the absolute legal estate of their respective portions. Meanwhile the estate in the hands of the trustees was charged with the support and education of the beneficiaries and also charged, to such extent as to the trustees should seem proper, with their advancements and settlement in life. The trustees were clothed with large discretionary powers, not only as to the maintenance and education of the beneficiaries and their advancement and settlement in life, but even to make a difference or distinction among them in the division and partition of the trust estate, "if from Providential visitation, or unforeseen casualty, or their own bad conduct, * * * said trustees shall think it right and proper and safest and best, under all the circumstances." The court held that the interest of the beneficiaries vested upon the testator's death, that upon the death of two of the children before the happening of the contingency upon which division was to be made, their respective interests passed to their personal representatives; that the beneficiaries of the trust took under the will itself, and not under the power of appointment vested in the trustees. Said Wagner, J.: "The law is said to favor the vesting of estates, the effect of which principle seems to be, that property which is the subject of any disposition whether testamentary or otherwise, will belong to the object of the gift immediately on the instrument taking effect, or as soon afterwards as such object comes into existence or the terms thereof will permit. As therefore a will takes effect at the death of the testator, it follows that any devise or bequest in favor of a person *in esse* simply (without any intimation of a desire to suspend or postpone its operation) confers an immediately vested interest.[19] The cases above stated are all strictly in accord with generally recognized principles that the vesting of distributive in the estate of decedents.[20]

WILLIAM L. MURFREE, JR.

[18] 40 Mo. 287.

[19] 1 Jar. on Wills, 726, note by Perk.; 2 Fearne on Rem., 73.

[20] Schoulers' Exrs. & Admrs., § 479. See, also, § 467; Croswell Exrs. & Admrs., § 527.

CRIMINAL LAW—EVIDENCE OF OTHER OFFENSES.

JANSEN V. PEOPLE.

Supreme Court of Illinois, January 20, 1896.

On the trial of defendant for rape alleged to have been committed on the person of his daughter, a girl 12 years old, it was error to admit, for any purpose, evidence of a like offense subsequently committed on the person of another daughter.

CRAIG, C. J.: This was an indictment in the circuit court of Stephenson county against Ebbert Jansen, plaintiff in error, for rape alleged to have been committed on or about the 1st day of May, 1894, upon the person of Mary Jansen, a daughter of the defendant, who at the time the offense was committed, was under the age of 14 years. On a trial before a jury, the defendant was found guilty as charged in the indictment, and his term of imprisonment was fixed at six years in the penitentiary. The court overruled a motion for a new trial, and entered judgment on the verdict, to reverse which the defendant sued out this writ of error.

It is first claimed by counsel for defendant that the court erred in the admission of improper evidence; and under this head it is said the prosecution was permitted to introduce evidence that another offense was committed by the defendant on the person of another daughter subsequent to the one charged in the indictment. Upon looking into the record it appears that Yetta Janzen, a sister of the prosecuting witness, was called and testified on behalf of the people, and from her evidence it appeared that she had been absent from home about three years living with a family named Clipping, who resided some five miles from the defendant. Upon cross-examination of the witness the following occurred: Counsel for defense stated that he desired to show that the witness had become displeased with her father because as she did not have as good a home with him as she had at Clipping's. By the court: "You may show that briefly, but not go into details." "Q. You did not want to stay at home did you, Yetta? A. No, sir. Q. Did your father want you to stay at home? A. Yes, sir." After this evidence was called out by the defendant, the court, over the objection of the defendant, permitted the witness on behalf of the people to testify as follows: "He tried to use me in a bad way in bed. First he was in another bed, and afterwards he came into my bed. The boys and Mary were outdoors. This was about 5 o'clock in the morning. After he got into bed, he took hold of my arms, and got on top of me. He unbuttoned my drawers, and put his private parts between my legs. I hollered, 'Ouch.' I hollered more than one.—not very loud. When I got up and went outdoors, I found half a dozen men there." The evidence was admitted, as stated by the court, for the purpose of showing why the witness Yetta left home, and the jury

were told by the court that the evidence was not admissible for the purpose of showing that defendant had committed a crime on the girl Yetta, and they should not consider it for that purpose. The defendant testified as a witness in his own behalf, and in cross-examination admitted that he was in bed with the girl Yetta on the morning of May 15th, the day he was arrested, but he testified that he did nothing to the girl; and in rebuttal the court, over the objection of the defendant, permitted three witnesses to testify that on the morning of May 15th they were in the defendant's home, and saw the defendant in bed with Yetta Janzen in the act of criminal sexual intercourse with her. This evidence was admitted by the court, as stated at the time, on the following ground: The Court: "I wish to state that this evidence is admitted because the defendant, in his examination, testified that he had gone into this room and got into the bed with this girl, but had done nothing else. If it was material and competent for him to testify as to that matter, I think it is proper that the prosecution should be permitted to contradict it, and for that purpose I admit it in evidence, and the jury will understand that they are not hearing it for the purpose of trying this defendant for any crime committed on Yetta, but simply for the purpose of contradicting his own testimony." If the evidence of the girl Yetta and of the three other witnesses in regard to what occurred on the morning of May 15th proves anything, the evidence proves the defendant guilty of a rape on the person of Yetta Janzen, an offense for which the defendant was not indicted, and for which he was never put upon trial; and the question presented is whether the admission of evidence which proves the defendant guilty of a crime not charged in the indictment is error for which the judgment should be reversed. In 2 Russ. Crimes, p. 772, the author says no evidence can be admitted which does not tend to prove or disprove the issue joined. In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule that the evidence is to be confined to the point in issue. It is therefore a general rule that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge. It will be remembered that the crime charged against the defendant in the indictment was a rape on the person of Mary Janzen. Any evidence which tended to prove the defendant guilty of the crime alleged in the indictment was proper for the consideration of the jury, but evidence which tended to prove the defendant guilty of another crime, another rape, on some person not named in the indictment, was not competent. When a defendant is put upon trial on an indictment, he is presumed to be ready to meet the charge contained in the indictment, but he is not presumed to be ready to defend against a charge not made against him in the indictment, nor does the law require him to meet such a charge. In Whart. Cr. Law, § 635, the author, among other things, says: "It is under no circumstances admissible for the prosecutor to put in evidence the defendant's general bad character, or his tendency to commit the particular offense charged, nor is it admissible to prove independent crimes, even though of the same general character, except when following strictly within the exceptions above stated." The exceptions alluded to by the author would not embrace the evidence under consideration. In Parkinson v. People, 135 Ill. 401, 25 N. E. Rep. 764, a similar question arose, and it was held that evidence tending to prove a similar but distinct offense from that for which one is being tried is not admissible for the purpose of raising an inference or presumption that the person committed the particular act for which he is on trial. See, also, Baker v. People, 105 Ill. 452. In criminal cases where it becomes necessary to prove a guilty knowledge on the part of a defendant, evidence of other offenses committed by him, though not charged in the indictment, may be admissible for that purpose. Thus, upon an indictment for uttering a forged bank note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner in order to show his knowledge of the forgery. 2 Russ. Crimes, p. 777. The case under consideration, however, is not a case of that character, and the rule there announced has no application to this case. It is true that the court undertook to confine the application of the evidence of Yetta Janzen to the question why she had left home, and to confine the application of the evidence of the three witnesses to a mere contradiction of the defendant's evidence that he had done nothing when in bed with the girl Yetta. There are cases where evidence not admissible generally may be admitted for a single purpose, and may be confined to that purpose by the instruction of the court, but this is not a case of that character. Here the defendant was indicted for a rape on his own daughter, a girl 12 years old. On the trial of the defendant for this charge, would it be possible to prove that the defendant had been guilty of a like offense on another daughter who was only a year or two older, and confine the effect of such evidence on the mind of the jury to some trivial or insignificant matter that arose on the trial? The answer to this question is obvious. It is true that the commission of one offense is not evidence of the commission of another and an independent offense; yet the proof of the one cannot be said to be without influence on the mind of the juror, convincing him that the defendant may be guilty of the other. In Shaffner v. Com., 72 Pa. St. 60, in speaking on this subject, the court said: "Logically, the commission of an independent offense is not proof, of itself, of the commission of another crime. Yet it cannot be said to be without influence on the mind; for certainly, if one be shown to be guilty of another crime equally hein-

ous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the mind of the juror to believe the prisoner guilty. * * * It is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but is detrimental to justice to burden a trial with multiplied issues that serve to confuse and mislead a jury." Whether the defendant was guilty of the charge contained in the indictment was a question for the jury, and it was the right of the defendant to have that question fairly submitted to the jury. That has not been done. The evidence of an independent offense was calculated to prejudice the jury, and we think it was error to admit that evidence. The judgment will be reversed, and the cause remanded. Reversed and remanded.

NOTE.—*Admissibility of Evidence of Other Crimes.*—The logic of the law applicable to the admissibility of evidence relevant to the issue, established at an early period of the common law the proposition that evidence of other crimes is not admissible upon the trial of a defendant for a specific offense. The object of an indictment is to give the accused distinct information of a specific charge, and, therefore, giving evidence of facts unconnected with that charge would be to take the accused by surprise. Nobody, it is said, can be prepared to answer and explain away every transaction of his life, and hence the courts have almost an invariable rule that evidence of other crimes and misdeeds must be shut out and the whole attention of court and jury confined to the single issue before them.

Peckham, J., in his opinion in the celebrated case of People v. Sharpe, says that the general rule is that when a man is put upon trial for an offense he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that under ordinary circumstances proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded. But for the purpose of showing guilt of the offense for which the prisoner is on trial, as also for the purpose, where that is important, of showing the motive or intent with which an act claimed to be a crime was committed, evidence which is material upon such issues is admitted, although it may also tend to show, or even directly prove, the guilt of the accused of some other felony or misdemeanor.

Thus, the general rule is not an absolutely inflexible one, and has some well defined exceptions. Rex v. Dossett, 2 C. & K. 306; Rex v. Geering, 18 L. J. M. C. 215; Rex v. Addy, 3 Den. C. C. 264; Rex v. Winslow, 8 Cox, 307; Rex v. Gray, 4 F. & F. 1102; Makin v. Atty. Gen., App. Cas. 57. The last mentioned case, decided in 1894, is a leading one on the subject. If we look at the cases in which, in criminal charges, evidence of other acts may be admitted against the prisoner, we find them falling into three classes: First. Where guilty knowledge is a necessary part of the offense, as in a charge of uttering counterfeit coin. Evidence of the passage of like money, within a reasonable time before or after the commission of the offense for which the prisoner is on trial, is admitted for the purpose of showing that when he passed the money in question it was not through ignorance of its character. So also for the purpose of proving that a shooting was not accidental, where such a fact is claimed, evidence may be given of efforts, or even threats, made by the defendant to shoot the same individual on prior occasions.

Secondly. Where malicious intent is the essential part of the crime, as in charges of false pretenses and embezzlement, where evidence may be given of previous errors of a similar kind in the accounts kept by the prisoner in order to negative a defense that the prisoner had made an innocent mistake. Rex v. Richardson, 2 F. & F. 343; Commonwealth v. Price, 10 Gray, 472; Copperman v. People, 56 N. Y. 591; Commonwealth v. Coe, 115 Mass. 481; Mayer v. People, 80 N. Y. 364; Commonwealth v. McCarthy, 119 Mass. 354.

Thirdly. In cases where other criminal acts of the prisoner, although in a sense distinct, are really in substance part of the same transaction, as, for instance, in cases of treason and conspiracy to commit a felony. State v. Lapage, 57 N. H. 245.

In the following cases evidence of this character has been held admissible as within one of the exceptions above noted: State v. Cowell, 12 Nev. 337, 6 Cent. L. J. 221; State v. Palmer, 65 N. H. 216; State v. Kline, 54 Iowa, 183; McDonald v. State (Ala.), 3 South. Rep. 305; Commonwealth v. Ferry (Mass.), 15 N. E. Rep. 484; State v. Matthews (Mo.), 10 S. W. Rep. 144; U. S. v. Boyd, 45 Fed. Rep. 851; Commonwealth v. Russell (Mass.), 30 N. E. Rep. 763; State v. Baker (Oreg.), 32 Pac. Rep. 161; Harris v. State (Tex.), 22 S. W. Rep. 1037; Burnett v. State (Tex.), 22 S. W. Rep. 47; People v. Patterson (Cal.), 36 Pac. Rep. 436; People v. Skutt, 96 Mich. 449; Proper v. State, 85 Wis. 615; Cross v. State (Ind.), 37 N. E. Rep. 790; Mason v. State (Tex.), 20 S. W. Rep. 564; Langford v. State (Fla.), 14 South. Rep. 815; Anson v. People (Ill.), 35 N. E. Rep. 145; Strong v. State (Tex.), 22 S. W. Rep. 680; State v. Walton (N. Car.), 18 S. E. Rep. 945; State v. Minton (Mo.), 22 S. W. Rep. 808; Sullivan v. State (Tex.), 20 S. W. Rep. 927; People v. Harris (N. Y.), 33 N. E. Rep. 65; People v. Walters (Cal.), 32 Pac. Rep. 864; Cross v. State (Tex.), 20 S. W. Rep. 579; Horn v. State (Ala.), 15 South. Rep. 278; Moore v. U. S., 150 U. S. 57; Davis v. State, 22 S. W. Rep. 794; State v. Fitzsimmons (R. I.), 27 Atl. Rep. 446; Frazer v. State (Ind.), 34 N. E. Rep. 817; State v. Burke, 56 N. W. Rep. 180.

In the following cases evidence of this character was excluded: Commonwealth v. Jackson, 132 Mass. 16; Kinchelon v. State, 5 Humph. (Tenn.) 9; People v. Corbin, 56 N. Y. 363; Bousal v. State, 35 Ind. 460; People v. Barney, 48 Cal. 551; Barton v. State, 18 Ohio, 221.

In the case of Proper v. State, 55 N. W. Rep. 1035, 85 Wis. 615, testimony of the character excluded in the principal case was held admissible, and is in direct opposition to the decision of the Illinois court.

JETSAM AND FLOTSAM.

THE "TRUST FUND" THEORY.

In the late case of Adams & Westlake v. Deyette, 65 N. W. Rep. 471, the Supreme Court of South Dakota rests its decision on the ground "that the assets of a corporation are a trust fund for its creditors." On this theory a judgment confessed by a corporation for money due on an executed *ultra vires* contract, admitted to give a right of action for the sum recovered, was set aside as a preference of creditors. The "trust fund" doctrine seems to owe its origin to a decision by Judge Story in 1824, in the case of Wood v. Dummer, 3 Mass. 308. Since that decision it has been alter-

nately applied and rejected by courts and eulogized and condemned by text writers. Within the last two years Judge Thompson has characterized it as "the only doctrine worthy of respect," and the Supreme Courts of Indiana, North Carolina and Alabama have distinctly repudiated it, the latter overruling a number of cases where its existence had been recognized. See 5 Thompson on Corporations, 5115; Bank of Crawfordsville v. Dovetail, etc. Co., 40 N. E. Rep. 810 (Ind.); Thomson-Houston Co. v. Henderson Co., 21 S. E. Rep. 951 (N. C.); Jewelry Co. v. Volfer, 17 South. Rep. 525 (Ala.).

Just what the doctrine is, even those who uphold it do not seem to know. It seems to be an accommodating judicial *ignis fatuus*, which is present or absent as courts seem to require. No court has been able to describe it exactly, or to define its limits. It is admitted that there is no trust in the strict sense of the term. But these admissions tend to still greater confusion. The logical conclusion of holding that there was a strict trust would be that the creditor of an insolvent corporation could not enforce his claim at law. When this argument was pressed on the court in Gottlieb v. Miller, 154 Ill. 44, they qualified their previous statement by holding that there was a "*quasi trust*" only. The United States Supreme Court has long been committed to the "trust fund" doctrine, yet in the recent case of Hollins v. Brierfield, etc. Co., 150 U. S. 371, Justice Brewer practically admits that the expression is figurative; and Justice Bradley, in Graham v. R. R. Co., 102 U. S. 148, while upholding the doctrine, is forced to acknowledge that "if pushed to its logical conclusion, it would lead to results not to be tolerated," and yet he does not seem able to define the limits within which it will be tolerated.

This general haziness that surrounds the whole doctrine leaves the student in a confused state of uncertainty as to what the doctrine really is. Mr. Pepper, however, in a recent able article (2 Am. Law. Reg. & Rev., N. S. 448), clears up much of this uncertainty. He deprecates the use of the expression "trust fund" as a misleading misnomer, and suggests that the courts have used it as a cover for judicial legislation. The cases seem to justify this view, and it must be admitted that justice often demands legislation by the courts in dealing with insolvent corporations.—*Harvard Law Review*.

POWER OF PROSECUTOR TO ENTER A NOLLE PROSEQUI WITHOUT CONSENT OF THE COURT.

In three recent cases the Supreme Court of Louisiana have lately held, after an extensive review of judicial authorities, that the State's attorney has no power to enter a *nolle prosequi* in a criminal case, without the consent of the court, after verdict and before judgment. Our learned contemporary, the *National Corporation Reporter*, approves this decision and gives an excellent certificate of character to Judge Moise, who refused to accede this power to the State's attorney. Doubtless what is said in favor of the character to Judge Moise is well said; but it nevertheless seems that the weight of judicial authority, is, and always has been, to the effect that the power to enter a *nolle prosequi* in a criminal case is an absolute power in the prosecuting officer of the Crown and of the State before the commencement of trial; that it is suspended during the trial; but that it revives after verdict and until sentence. It may interest our learned friend of the *National Corporation Reporter* to know that Dr. Joel Prentiss Bishop, certainly the greatest living master of criminal law, gave an opinion in opposition to the ruling of Judge Moise, which opinion was probably not even read by the Supreme Court of Louisiana. At least we have seen a letter of Dr. Bishop stating his belief that it was not read.—*American Law Review*.

CONVERSION BY PLEDGEE.

Two recent cases, Waring v. Gaskill, 22 S. E. Rep. 659 (Ga.), and Richardson v. Ashby, 33 S. W. Rep. 806 (Mo.), are authority for the proposition that where a pledgee tortiously sells his pledge, or repledges it for a greater sum than the debt for which it is security, the pledgor has an immediate right to bring an action in trover without tendering the amount of his indebtedness. What little law there is on this subject is unsettled. It would seem the more natural step to bring an action for violation of the contract of pledge, or to tender payment before bringing the action of trover. In the action on the contract, at least, an equitable defense would be allowed. The plaintiff's damages would be diminished by the amount of his debt to the defendant, the pledgee.

On the precise question involved in the two cases cited there is a conflict of opinion. In England the law is contrary to these authorities. The first English case on the subject, Johnson v. Stear, 15 C. B. (N. S.) 330, held that the pledgee's act was conversion, but that the amount of damages should be only the pledgor's actual loss—that the pledgee's interest in the pledge at the time of the conversion should be taken into account. Mr. Justice Williams in an able dissenting opinion maintained that the pledgee stood in practically the same position as a factor—that by his act the pledgor regained immediate right of possession, and was entitled to judgment in trover for the full value of the goods. Obviously, if there was conversion at all, full damages should have been awarded. Two later cases, Donald v. Suckling, L. R. 1 Q. B. 585, and Halliday v. Holgate, L. R. 3 Ex. 299, practically overruled Johnson v. Stear by holding that there was no conversion. To support this view, the court maintained that a pledge is something more than a mere bailment, and that the pledgee, by parting with possession, does not lose his special property in the pledge. Mr. Justice Shee dissented in Donald v. Suckling on the grounds put forth by Mr. Justice Williams in the earlier case. Nevertheless, these two cases represent the English law.

In the United States the question is still open. Some courts adopt the English view without question or hesitation. Others maintain the views adopted by Georgia and Missouri courts. The English doctrine would seem to be the less satisfactory. There is no cogent reason for holding that the pledgee gets so much more extended rights than a bare bailee that he can dispose of the article pledged without losing his lien. It would seem more natural and consistent that, apart from the privilege of pledging up to the amount of the original security—a proceeding which in no way affects the first pledgor's position—the pledgee should have no more right than the factor holding his principal's goods, on which he loses his lien in parting with possession. Just as the pledgor may maintain trover for destruction of the pledged goods by the negligence of the pledgee, so should he be allowed trover when the pledgee has repledged the goods for an amount greater than the original pledgor's indebtedness to him.—*Harvard Law Review*.

BOOK REVIEWS.

ABBOTT'S SELECT CASES ON CODE PLEADING.

This volume though designed primarily for the use of practitioners in New York State is of value in others of the States which have adopted similar codes of procedure. It contains an admirable selection of the leading New York cases on the subject of pleading under the code, together with notes of recent cases from other States on this subject. The last mentioned are considered and grouped together separately under their particular State thus affording the practitioner from each State an easy means of reviewing those decisions which are of special value to him. The selection of the cases and the notes are by Austin Abbott, Esq., whose qualification for such work is of the highest order. It is a volume of nearly eight hundred pages published by the Diossy Law Book Company. New York.

SEDGWICK'S ELEMENTS OF DAMAGES.

This little book is, as the author states, "an attempt to review the law of damages, to state its principles so far as possible in the form of rules, or propositions of law, such as a court might lay down to a jury · · · and to illustrate these by the cases from which they have been drawn." It is not an abridgment of "Sedgwick on Damages," a treatise which has now attained its eighth edition, and which is the most exhaustive and comprehensive work on the subject of Measure of Damages published. The present work is a handbook for students as well as practitioners. It is admirably prepared, states the rules applicable to the subject clearly and concisely and cites as many authorities as are needed to illustrate the propositions of law laid down. It is a volume of 350 pages, and is published by Little, Brown & Co. Boston.

AMERICAN ELECTRICAL CASES, VOL. 4.

Upon the appearance of preceding volumes of this series we took occasion to call attention to their modern value and usefulness. The cases reported in this volume were decided between Jan. 1, 1892, and April 1, 1894. The great number of them (one hundred and thirty eight) is an evidence of the remarkable growth of the law bearing on electricity and questions akin thereto. In this volume will be found cases on municipal control of electrical companies, placing wires underground, right of abutting land owner in respect to use of highway for electrical purposes, crossing of steam railroads by electric railways, negligence of electrical companies in maintenance or operation of their apparatus, discrimination by telephone companies, the duties of telegraph companies to their patrons and the public and many other kindred topics. There are also annotations by the editor W. W. Morrill. Published by Matthew Bender, Albany, N. Y.

BOOKS RECEIVED.

The Detective Faculty, as Illustrated from Judicial Records and the Actualities of Experience. By W. H. Bailey, Sr., LL. D. Author of "Onus Probandi," "Conflict of Judicial Decisions," "Self-Taught Law," etc. Cincinnati: The Robert Clarke Company. 1896.

A Treatise on the Law of Negligence. By Horace Smith, B. A., Elaborated with Notes and References to American Cases. By W. H. Whittaker, of the Cincinnati Bar. Second American—from Second English Edition. Re-edited, and Enlarged with the Citation of all the American Cases Brought Down to Date. By James Avery Webb, Editor of the Last Editions of Pollock on Torts and Burrill on Assignments. St. Louis. The F. H. Thomas Law Book Co. 1896.

The French Law of Marriage, Marriage Contracts and Divorce, and the Conflict of Laws Arising Therefrom; Being a Second Edition of "Kelly's French Law of Marriage," Revised and Enlarged by Oliver E. Bodington, B. A. (Lond.), of the Inner Temple, Barrister at Law, Member of the Federal Bar, U. S. A.; Licencie en Droit de la Faculte de Paris. London. Stevens & Sons, Limited, 119 and 120, Chancery Lane, New York: Baker, Voorhis & Co., Law Publishers and Booksellers. 1895.

HUMORS OF THE LAW.

In North Carolina last year the Republicans elected some of their judges for the first time in over twenty years, and one of that party was so delighted that when Judge Robison, one of the new judges, came to hold court, he put on a new suit, including a new pair of shoes, and went to the court house to "see a Republican judge on the bench." He began at the door and his shoes went creak, creaky, creak all the way down till he got near the judge to get a good view and feast his eyes on the novel sight. The judge stopped and eyed him, the proceedings stopped, all eyes were fixed on the newcomer with the creaking shoes, whose nervousness and the sudden stillness made the creaking seem louder than ever. When the owner of the shoes had about reached a vacant seat, the judge stormed at him: "Sit down there, shoes and all." There is now one man in that county who no longer hankers to "see a Republican judge on the bench."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMINISTRATION—Proceedings—Collateral Attack.—An administration, and an administrator's sale of the estate of an immigrant to Texas, who died after the war with Mexico, and was a citizen soldier, are not void, and subject to collateral attack on the ground of fraud, because such fraud may be inferred from the course and result of the proceedings, without other proof, if a want of jurisdiction is not shown.—SHIRLEY V. WARFIELD, Tex., 34 S. W. Rep. 390.

2. ARBITRATION AND AWARD—Insurance.—In a suit to set aside an award under an insurance policy plaintiff may allege that defendant apparently agreed to arbitrate the loss, but failed and refused to meet the arbitrators at times set therefor by plaintiff, in order to introduce evidence to show bad faith on the part of defendant.—ROYAL INS. CO. V. PARLIN & ORENDORFF CO., Tex., 34 S. W. Rep. 401.

3. ASSIGNMENT OF PROSPECTIVE PATENTS—Validity.—To constitute a valid sale at law, the vendor must have a present property, either actual or potential, in the thing sold. The rule in equity is different. The equity in the assignee or vendee attaches to the contemplated thing the instant it comes into being.—MCFARLAND V. STANTON MFG. CO., N. J., 33 Atl. Rep. 962.

4. ATTORNEY AND CLIENT—Authority of Attorney—Burden of Proof.—The presumption is that an attorney appearing in court for a party has authority to do so; and where the want of authority is questioned, the burden of proof is on the party attacking, and such want must be established by positive proof.—BONNIFIELD V. THORP, U. S. D. C. (Alaska), 71 Fed. Rep. 922.

5. BANKS—Insolvency.—In the absence of any statute to that effect, one who deposits money in an insolvent bank, believing it to be solvent, and thereby loses his money, has no cause of action against the directors of the bank, unless the deposit was induced by their fraudulent conduct.—MINTON V. STAHLMAN, Tenn., 34 S. W. Rep. 222.

6. BENEVOLENT SOCIETIES—Constitutional Provisions.—Where the constitution of an endowment society provides for a certain procedure as precedent to the suspension of a subordinate lodge and its members from all share in the endowment fund for non-payment of assessments made by the supreme authorities of the society, a member of such lodge cannot be deprived of his share in the fund unless the suspension of the lodge was in accordance with such constitutional requirements.—YOUNG V. GRAND LODGE OF SONS OF PROGRESS, Penn., 33 Atl. Rep. 1038.

7. BOUNDARIES—Adjoining Landowners.—Where adjoining landowners agree on an incorrect division line, and the land along a portion of the line is occupied by each for a period sufficient to confirm his title by adverse possession to any land incorrectly awarded, the true, and not the adopted, line controls as the division line beyond the points of actual occupancy.—WARD V. IHLER, Mo., 34 S. W. Rep. 251.

8. BUILDING AND LOAN ASSOCIATION—Usury.—The exaction by a loan association from a member, in addition to the principal of the loan, of a sum comprising fines, premiums and interest paid, exceeding 6 per cent. on the principal sum, constitutes usury.—UNITED STATES SAVING & LOAN ASSN. V. SCOTT, Ky., 34 S. W. Rep. 235.

9. CARRIERS—Limitations in Bill of Lading.—A stipulation, in a bill of lading for the transportation of cotton in bales by steamboat and a railroad as a connecting carrier for hire, that neither shall be responsible for damage which shall be occasioned by fire, does not exonerate either from responsibility for such damage as shall result from fire that is occasioned through the fault or ordinary negligence of the agents, servants or employees of the carrier.—MAXWELL V. SOUTHERN PAC. R. CO., La., 19 South. Rep. 287.

10. CARRIERS OF GOODS—Foreign Railroad Company—Joint Liability—Evidence.—An action against a foreign railroad company, operating a line and having an agent in El Paso county, and a connecting line, for damages in transporting freight from Chicago to Dallas, was properly brought in Dallas county, where it appeared that the transportation of said freight was solicited by an agent of the latter company at Dallas, on certain terms, over a route composed of both companies, and that the former accepted the freight at Chicago on the terms agreed upon.—GULF, C. & S. F. RY. CO. V. EDLOFF, Tex., 34 S. W. Rep. 410.

11. CERTIORARI—Interest of Prosecutor.—In a contest, raised in a *certiorari* proceeding, between two street railways, each claiming the exclusive right to lay its track in a certain street, the prosecutor failed altogether to show its own interest in such controversy: Held, that the prosecutor had no standing in court to question the right of its adversary.—STATE V. BOARD OF PUBLIC WORKS OF CITY OF CAMDEN, N. J., 33 Atl. Rep. 966.

12. CONSTITUTIONAL LAW—Grant by State—Exclusive Privilege.—The provision in art. 4, § 7, par. 11, of the constitution of New Jersey, adopted in 1875, forbidding the grant to any corporation or individual of any exclusive privilege, immunity or franchise, does not affect the validity of an act of the legislature, passed in 1861, authorizing a riparian proprietor to erect, hold and enjoy a wharf in front of his land, and upon land belonging to the State, under tide water.—ROBERTS V. BROOKS, U. S. C. C. (N. Y.), 71 Fed. Rep. 914.

13. CONSTITUTIONAL LAW—Liberty of Contract—Class Legislation.—A statute of Ohio (87 Ohio Laws, p. 149), provides that no railroad company, insurance company or association, or other persons shall require any agreement or stipulation with any other person, in or about to enter the employment of a railroad company, whereby such person agrees to waive any right to damages from such railroad company for personal injuries, or any other right whatever, and all such agreements and stipulations shall be void: Held, that such statute violates the fourteenth amendment of the constitution of the United States, by depriving the persons affected by it of their liberty of contract, without due process of law, and also violates art. 2, § 26, of the constitution of Ohio providing that all laws of a general nature shall have uniform operation throughout the State; since such statute is class legislation, affecting only railroad employees, and accordingly that such statute is void.—SHAVER V. PENNSYLVANIA CO., U. S. C. C. (Ohio), 71 Fed. Rep. 931.

14. CONTEMPT—Power to Punish—Rev. St. § 725.—Bribing a person, who is known to be a material witness in a pending cause, to hide himself and remain away from the court, thereby preventing his testifying in such cause, is a contempt of court, whether such person has been subpœnaed or not, and though punishable by indictment, under Rev. St. § 5399, is also punishable under Rev. St. § 725, as a contempt committed by misbehavior, "so near" to the court "as to obstruct the administration of justice," though the act is done at the residence of the witness, at some distance from the courthouse, in the town where the court sits.—IN RE BRULE, U. S. D. C. (Nev.), 71 Fed. Rep. 944.

15. CONTRACT—Chattel Mortgage—What Constitutes.—An instrument executed by one partner, conveying all his interest in the partnership chattels to a firm creditor to secure a firm debt, which provided that the goods so conveyed should remain in the place of business, subject to all the rights of the other partner, that the firm debts should first be discharged, and that only the net interest of the grantor should be subjected to the grantee's debt, is a mortgage securing the individual debt of the grantee, and not a deed of trust, imposing on him the duty to take into his possession the entire interest of the grantor in order to protect other creditors of the firm.—MILLHISER V. PLEASANTS, N. Car., 28 S. E. Rep. 969.

16. CONTRACT—Construction—Compensation.—Where a contract for a fixed amount is entered into between the owner of property and a builder, according to certain specifications, to which a plan is annexed, as explanatory thereof, no charge, in the absence of an agreement to that effect, can be made as for extra services in the preparation of the plan. The builder appears in the transaction, not as an architect, but as a contractor.—MAAS v. HERNANDEZ, La., 19 South. Rep. 269.

17. CONTRACT—Damages — Penalty.—A contract for the sale of ties to a railroad company provided that the company should retain 10 per cent. of the monthly payments, which were to be made according to the number of ties delivered, "as agreed compensation for damages" in case the whole number of the ties were not delivered: Held, that the stipulation was for a penalty, and not for stipulated damages.—GULF, C. & S. F. RY. CO. v. WARD, Tex., 34 S. W. Rep. 328.

18. CONTRACT—Gambling Contracts.—Contracts between a stockbroker and a customer for buying or selling stocks upon a margin, in the hope of profit from the fluctuation in price, are not illegal, if either party expects the final balance to be liquidated by a delivery of the remaining stocks.—DILLAWAY v. ALDEN, Me., 33 Atl. Rep. 981.

19. CONTRACT—Suit by Third Party.—The holder of coupons representing interest upon railroad bonds has no right of action on an agreement by the lessee of the railroad to apply the net earnings to the payment of the interest coupons, and to buy up the coupons if the net earnings should not be sufficient to pay them; such holder of coupons being a stranger to the contract and the consideration.—FREEMAN v. PENNSYLVANIA R. CO., Tenn., 33 Atl. Rep. 1034.

20. CONTRACT FOR ROYALTIES—Manufacture of Steel.—Manufacturers of steel known by a certain name agreed with plaintiffs, who had assisted them in the development of the process of manufacture, to pay the latter one cent per pound for all such steel sold by the former: Held, that plaintiffs were not entitled to the specified royalty upon other steel sold by the same manufacturers merely because, in the process of manufacturing both steels, oxide was reduced into metallic chromium by the same process, the steel referred to in the contract being high in carbon and low in chromium, and very hard and brittle, and the other being high in chromium and low in carbon, and having great cohesion on impact.—TODD v. WHEELER, Penn., 33 Atl. Rep. 1021.

21. CORPORATIONS—Contracts — Accommodation Indorsement.—Const. art. 12, § 6, providing that "no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and fictitious increase of stock or indebtedness shall be void," does not render the accommodation indorsement on a draft by a corporation void in the hands of a *bona fide* holder for the value before maturity.—MARSHALL NAT. BANK v. O'NEAL, Tex., 34 S. W. Rep. 344.

22. CORPORATIONS—Dissolution — Non-user of Franchise.—The facts that a corporation disposed of that part of its property which was necessary to carry on its business, and never thereafter elected directors, or otherwise exercised its corporate powers, and that one person acquired ownership of all the stock, did not dissolve the corporation.—PARKER v. BETHEL HOTEL CO., Tenn., 34 S. W. Rep. 209.

23. CORPORATIONS — How Sued.—The United States Express Company is a joint-stock company or association, formed under the laws of the State of New York, which expressly authorize any such company or association to sue and be sued in the name of its president or of its treasurer: Held, that the company possesses such corporate existence and powers that it does not fall within the provisions of the supplement to the practice act of May 23, 1890 (Laws, 1890, p. 353), and an action may be maintained against it in this State in the manner prescribed by the laws of New York, viz: in the name of its treasurer.—EDGEWORTH v. WOOD, N. J., 33 Atl. Rep. 940.

24. CORPORATIONS — Insolvency — Assignment for Benefit of Creditors.—Where a statute provides that, on "dissolution" of a corporation, its property shall be in the hands of its officers a trust fund for the payment of its debts, after the property, consisting entirely of personalty, of an insolvent corporation, which has abandoned business, has, by unanimous action of its stockholders, been placed in the hands of its officers for distribution among creditors, though without deed, the property is not subject to attachment at the suit of creditors of the corporation. — WRIGHT v. EULESS, Tex., 34 S. W. Rep. 302.

25. CORPORATIONS—Receiver — Actions.—A receiver cannot, in the absence of a statute to the contrary, be sued without leave of the court, which appointed him, granted in the cause in which he was appointed.—LINKS v. CONNECTICUT RIVER BANKING CO., Conn., 33 Atl. Rep. 1003.

26. COURTS—Conflict of Jurisdiction—Exemptions.—In a suit in Texas on an insurance policy issued by a foreign corporation, where plaintiff is a resident of the State, and the goods insured and the proceeds of the policy are exempt, and where, prior to the filing of such suit, the insurer, in another State, of which it was also a foreign corporation, was garnished by a creditor residing there for a debt owing by assured, it will be presumed, in the absence of evidence, that the exemptions in the foreign State are the same as those of the local State, and the local court may render judgment for plaintiff.—CALEDONIA INS. CO. v. WENAR, Tex., 34 S. W. Rep. 386.

27. CRIMINAL EVIDENCE—Confession.—In order that a confession may be proven, it is not necessary to repeat the words. It is enough if the substance of the confession be given.—STATE v. DESROCHES, La., 19 South. Rep. 250.

28. CRIMINAL EVIDENCE—Indictment.—Where the indictment for passing a forged instrument alleged, and the proof showed, that such instrument was beyond the jurisdiction of the court, secondary evidence to prove such instrument may be admitted, under a notice in the indictment requiring defendant to produce the original on the trial, or allow secondary evidence to be admitted.—THORNLEY v. STATE, Tex., 34 S. W. Rep. 264.

29. CRIMINAL EVIDENCE — Rape. — In a rape case, original evidence by the State of complaint by the prosecutrix must be strictly limited to the facts that complaint was made, when, where, and to whom it was made, and that she accused some one, who must not be named, of the offense; excluding all evidence of the particulars of such complaint.—REDDICK v. STATE, Tex., 34 S. W. Rep. 274.

30. CRIMINAL LAW—Assault.—On a trial for aggravated assault, the fact that prosecutor had been in the habit of spying on persons on other occasions was inadmissible to discredit prosecutor.—PARKER v. STATE, Tex., 34 S. W. Rep. 265.

31. CRIMINAL LAW — False Pretenses—Indictment.—An indictment founded on the statute relating to false pretenses must exhibit a pretense which, under the circumstances stated, must have an apparent tendency to induce the person defrauded to part with his property.—ROPER v. STATE, N. J., 33 Atl. Rep. 970.

32. CRIMINAL LAW—Former Jeopardy.—Const. Bill of Rights, art. 1, § 14, provides that a person shall not again be put on trial for the same offense after a verdict of not guilty in a court of competent jurisdiction. Code Cr. Proc. art. 525, provides that a plea that defendant has been before acquitted in a court of competent jurisdiction, whether the acquittal was regular or irregular shall be valid: Held, that where defendant was tried on a defective indictment for murder in the first degree, and convicted of manslaughter, such conviction was a bar to a subsequent trial for murder.—MIXON v. STATE, Tex., 34 S. W. Rep. 290.

33. CRIMINAL LAW—Gaming.—A livery stable, or room connected therewith, not being mentioned in the statute prohibiting the playing of cards in a public place, the question whether it is a public place, within the statute, is for the jury.—SISK v. STATE, Tex., 34 S. W. Rep. 277.

34. CRIMINAL LAW—Grand Larceny—Possession.—A charge that, if recently stolen property was found in defendant's possession, and he gave an explanation of said possession which appeared reasonably true, the jury could not convict, unless satisfied that the other testimony in the case established the falsity of the explanation, was erroneous, as a charge on the weight of evidence.—WILSON v. STATE, Tex., 34 S. W. Rep. 284.

35. CRIMINAL LAW—Homicide.—If a party, with intent to kill or murder a particular person, illegally and feloniously shoots at him, his will being directed exclusively to that end, but he fails to accomplish his purpose, and unintentionally kills another person, he has no reason to complain if, under an indictment for murder, he is found guilty of manslaughter, because he may not have had reason to expect that his shot would strike a third person.—STATE v. SALTER, La., 19 South. Rep. 265.

36. CRIMINAL LAW—Indictment—Grand Jury.—An indictment will not be set aside because the grand jury received the testimony of an incompetent witness for the prosecution.—DOCKERY v. STATE, Tex., 34 S. W. Rep. 281.

37. CRIMINAL LAW—Instructions.—An instruction to convict defendant if the facts and circumstances cannot reasonably be accounted for by any other reasonable hypothesis than that defendant is guilty is erroneous.—WEBB v. STATE, Miss., 19 South. Rep. 238.

38. CRIMINAL LAW—Murder—Proof of Corpus Delicti.—On a murder trial there was evidence that deceased had lived with defendants, and that witness was taken by them to a thicket near their house, and shown the dead body of deceased lying on the ground; that witness did not see the face, which was covered by a bloody cloth, or any mark of violence on the body; that witness assisted in burying the body, and that he was threatened with injury if the matter became known. It was not shown that the blood on the cloth was that of deceased or whether the body was cold at the time of burial, and it was shown that after the body was exhumed no marks of violence were found: Held, that the *corpus delicti* was not proved.—CONDE v. STATE, Tex., 34 S. W. Rep. 286.

39. CRIMINAL LAW—New Trial—Alien Juror.—Where defendant failed to test on *voir dire* examination the qualifications of a juror, he cannot object after conviction, on motion for a new trial, that the juror was an alien.—MILLS v. STATE, Tex., 34 S. W. Rep. 271.

40. CRIMINAL PRACTICE—Forgery — Indictment.—An indictment alleging that defendant forged an indorsement on the back of "a certain draft, described as follows," sufficiently indicates that the said draft is set out in *hæc verba*.—MILLER v. STATE, Tex., 34 S. W. Rep. 267.

41. CRIMINAL PRACTICE—Theft from Child—Indictment.—In an indictment for theft of jewels, given by a parent to a child, which, at the time of the larceny, were in a box under the parent's control, but to which the child had access, it is only necessary to charge ownership in the parent.—WRIGHT v. STATE, Tex., 34 S. W. Rep. 273.

42. CRIMINAL TRIAL—Robbery.—Defendant and a confederate induced the owner of money to expose it in his hands, and defendant snatched it and passed it to his confederate, who attempted to run off with it. The owner then drew a revolver, and such confederate also drew a revolver to prevent the owner from regaining his property; but defendant, by promising such owner to return the money, pacified him until the confederate had made way with it: Held, that the offense was not robbery.—ROUTT v. STATE, Ark., 34 S. W. Rep. 262.

43. CRIMINAL TRIAL—Competency of Jurors.—Jurors who tried a person for playing at a game with cards in a public place, and rendered a verdict of guilty, were incompetent to sit on a subsequent trial of another person for playing with the former at the same game, where the evidence on the second trial was the same as that on the first.—OBENCHAIN v. STATE, Tex., 34 S. W. Rep. 278.

44. CRIMINAL TRIAL — Competency of Witness.—Under Code Cr. Proc. art. 730, subd. 5, providing that persons convicted of felony shall be incompetent as witnesses, and Pen. Code, art. 27, providing that a person is a convict after final condemnation, one convicted of a felony, but not sentenced, is a competent witness.—EVANS v. STATE, Tex., 34 S. W. Rep. 285.

45. DEATH BY WRONGFUL ACT — Damages.—In estimating the actual pecuniary value of decedent's life to his surviving children, it is proper to consider his probable duration of life, his health, net income, habits of industry and economy, and reasonable future expectations.—LOUISVILLE & N. R. CO. v. GRAHAM'S ADM'R, Ky., 34 S. W. Rep. 229.

46. DEATH BY WRONGFUL ACT — Loss of Wife's Society.—A recovery under Gen. St. ch. 57, § 1, by the personal representative of a wife whose death resulted from injuries received through the negligence of a railroad company, or its employees, bars an action by the husband to recover damages for loss of the wife's society from the time the injuries were inflicted until her death.—LOUISVILLE & N. R. CO. v. MCELWAIN, Ky., 34 S. W. Rep. 237.

47. DECEIT—Purchase of Goods.—The statement by an intending purchaser of goods that his financial condition was at least as good as that shown by a statement made the previous year, is fraudulent if in fact his indebtedness arising from purchases of goods is ten times as great as it was the previous year, though he has the goods so purchased as part of his assets.—WHITE v. ROSENTHAL, Penn., 33 Atl. Rep. 1027.

48. DEED—Cancellation.—If a party can read, it is not open to him, after executing a deed, to insist that the terms of it were different from what he supposed them to be when he signed it.—ELDRIDGE v. DEXTER & P. R. CO., Me., 33 Atl. Rep. 974.

49. DEED—Proof of Execution.—A deed is not inadmissible in evidence because not recorded in the county where the land conveyed is situated, where no question of notice is involved, and the record is not relied on to prove its execution.—STOOKSBERRY v. SWANN, Tex., 34 S. W. Rep. 369.

50. DEED AS MORTGAGE—Purchase with Notice.—One purchasing land with knowledge that the absolute deed which had been given to his grantor was intended as a mortgage is not an innocent purchaser.—BRISTOW v. ROSENBERG, S. Car., 23 S. E. Rep. 957.

51. DRAINAGE—Obstruction—Presumption.—It is the servitude of the lower estate to receive and dispose of the water that flows naturally from the estate above, and no obstruction to that flow can be created by the proprietor of the lower estate.—FOLEY v. GODCHAUX, La., 19 South. Rep. 248.

52. ESTOPPEL—Rescission.—At the request of plaintiff, defendant took charge of the estate of a decedent, to sell the property for the benefit of the widow. Plaintiff failed to disclose to defendant that the estate was indebted to him: Held, that plaintiff was estopped, after defendant had paid the proceeds over to the widow, to claim that defendant was liable to him, as an administrator *de son tort*, for his claim against the estate.—COXWELL v. PRINCE, Miss., 19 South. Rep. 237.

53. EXECUTION—Exemptions.—Two barber chairs, a mirror in front of and a table accompanying each, used constantly for five years in carrying on his trade by a barber, a citizen of the State and head of a family, are exempt from execution, where he is dependent on his trade for support, and has kept another barber

employed to assist him.—FORE v. COOPER, Tex., 34 S. W. Rep. 341.

54. FACTOR AND CUSTOMER — Fraudulent Conveyances.—Creditor and debtor having by written agreement established between themselves the relations of factor and customer, and definitely agreed upon the amount of credit which should be given by the former, and the manner in which the latter should discharge the same by the consignment and proceeds of sale of products, other and subsequent creditors of the common debtor are without right to complain.—PHILLIPS v. FELICIANA COTTON OIL CO., La., 19 South. Rep. 258.

55. FALSE IMPRISONMENT — Railroad Detective — Unauthorized Act of Agent.—A railway detective, who was authorized to ferret out crimes against the company, and who had general instructions not to make arrests without first consulting the local attorneys of the road, but who was authorized to make arrests without such consultation, when the proof was clear, and where there was danger of an escape, was acting within the scope of his authority in causing the arrest, without consultation, of a person on a charge of attempting, in the presence of such detective, to pass counterfeit money on a station agent in payment for a ticket.—EICHENGREEN v. LOUISVILLE & N. R. CO., Tenn., 34 S. W. Rep. 219.

56. FIXTURES—What Constitute.—A heater and range, although but slightly attached to the building, are fixtures, if put in by the owner of the premises with the intention of making them such.—ERDMAN v. MOORE, N. J., 33 Atl. Rep. 958.

57. FRAUDULENT CONVEYANCE—Recording.—A mortgage of land, given by one, while solvent, to secure a debt, though withheld from record by consent of the parties, to avoid injuring the credit of the debtor as a merchant, is not void, as against a creditor, whose debt then existed in the form of a note secured by solvent sureties, the agreement to withhold not having been made to deceive, but in good faith, the holder of the note not having known, till the recording of the mortgage, that the debtor owned the land, and not having extended credit on the note, for any definite time, while the mortgage was withheld from record, but merely delayed obtaining judgment, after the note was dishonored, till the debtor and sureties were insolvent.—BANNER v. ROBINSON, Tex., 34 S. W. Rep. 355.

58. GARNISHMENT—Liability as Garnishee.—The facts that a note on which one was liable as indorser was discharged out of the proceeds of a chattel mortgage given by the debtor to prefer certain creditors, including the holder of the note, which was fraudulent as to creditors in general, and that the indorser participated in the fraud, did not render the latter liable as garnishee, since he neither received through the transaction any of the property of the debtor or any of the proceeds thereof.—SCHWARTZBERG v. FRIEDMAN, Tex., 34 S. W. Rep. 335.

59. GIFT—Deposit in Savings Bank.—Where an account is opened and money deposited by a father in the joint names of himself and his child in a savings bank whose by-laws provide for the issuing of a pass book to each depositor, and require its production when money is drawn, the question whether the intention of the parent is to create a joint estate, with absolute right of survivorship, or merely to make the child his agent for convenience in drawing the money, is to be determined by the circumstances of the case and the conduct and declarations of the parent.—SKILLMAN v. WIEGAND, N. J., 33 Atl. Rep. 929.

60. GIFT—Solvency of Donor.—A conveyance of land as a gift is valid, as against creditors of the donor, when, at the time it was made, he had sufficient remaining property in the State, subject to execution, to pay all his debts.—WALKER v. LORING, Tex., 34 S. W. Rep. 405.

61. HUSBAND AND WIFE — Antenuptial Contract—Dower.—An antenuptial contract reciting a conveyance to the intended wife "as jointure, and in lieu and full satisfaction of her whole dower" in the husband's estate, precludes the wife from claiming dower, after her husband's death, in land acquired by him during the marriage.—BRYAN v. BRYAN, Ark., 34 S. W. Rep. 260.

62. HUSBAND AND WIFE—Husband as Wife's Agent.—Under Code, § 2293, providing that all business carried on by the husband with the property or means of the wife shall be deemed to be on her account and for her use, and by the husband as her agent and manager, unless a contract changing such relation be executed, acknowledged, and filed for record, a wife, whose husband manages her plantation, is liable for all goods bought by him, within the scope of his agency, whether all are devoted to use in the business managed by him or not.—GROSS v. PIGG, Miss., 19 South. Rep. 235.

63. HUSBAND AND WIFE — Wife's Separate Estate—Declarations.—In trespass to try title, declarations of a husband as to ownership of lands the title to which is in the name of the wife are inadmissible to impugn the title.—EVANS v. PURINTON, Tex., 34 S. W. Rep. 350.

64. INJUNCTION—Abutting Owners—Rights in Street.—It is sufficient, in a bill for an injunction to restrain a steam railroad company from laying its tracks on the land of the complainant, to allege that the complainant is the owner and occupant of the premises, giving the boundaries thereof, without introducing the claim of title under which he holds.—LEWIS v. PENNSYLVANIA R. CO., N. J., 33 Atl. Rep. 932.

65. INJUNCTION—Inequitable Contract—Banks and Banking.—A bill which seeks to restrain the sale by a bank of property pledged as collateral security to a note discounted by it, on the ground that the president of the bank secretly agreed that he would see to the payment of the note without sale of the collateral, does not state a case for equitable relief, since such agreement, being against the interest of the bank, should not be enforced for the benefit of a party to it.—BREYFOGLE v. WALSH, U. S. C. C. (Ill.), 71 Fed. Rep. 899.

66. INSURANCE—Arbitration Clause—Effect of Award.—Part of the insured property having been totally destroyed and part damaged, the amount of the loss was submitted to arbitration: Held, that since the arbitration clause in a policy has no reference to property totally destroyed, the award of the arbitrators did not preclude an additional recovery for the loss sustained by total destruction of the property.—LIVERPOOL, LONDON & GLOBE INS. CO. v. COLGIN, Tex., 34 S. W. Rep. 291.

67. INSURANCE—Construction of Policy.—A clause in a policy providing for the insurance of premises for a certain period, "while occupied" for saddlery purposes, does not make a mere change of occupation avoid the policy, where it contains another provision avoiding it if the risk be increased by a change of occupation.—EAST TEXAS FIRE INS. CO. v. KEMPNER, Tex., 34 S. W. Rep. 393.

68. INSURANCE—Mortgage Clause.—A mortgage clause provision, in a policy payable to a mortgagee as interest may appear, that it shall not be invalidated, as against the mortgagee, by any act or neglect of the mortgagor, by whom it was taken out, does not prevent the forfeiture of the policy, under provisions that the policy "shall be void" in case the property is encumbered, and that it "shall not become valid" if the mortgagor be guilty of any concealment, for concealment by the mortgagor of the existence of other liens.—HANOVER FIRE INS. CO. v. NATIONAL EXCHANGE BANK, Tex., 34 S. W. Rep. 333.

69. INSURANCE COMPANIES—Taxation.—Losses of an insurance company are necessary incidents of its business are constantly occurring, and are provided against in the risk undertaken; and premiums are collected for the purpose of reimbursement.—HOME INS. CO. v. BOARD OF ASSESSORS, La., 19 South. Rep. 280.

70. JUDGMENT—Collateral Attack.—Without resorting to the revocatory action, the judgment creditor may contest the judgment of another against the common

debtor, when the contested judgment is assailed as a simulation, based on no consideration.—GLADNEY v. MANNING, La., 19 South. Rep. 276.

71. JUDGMENT — Collateral Attack — Injunction.—A judgment valid on its face cannot be collaterally attacked, as in an action to enjoin an execution sale thereunder, by purchasers of land, on which the judgment is a lien, from the judgment creditor subsequent to the rendition of the judgment.—KIRK v. DUREN, S. Car., 23 S. E. Rep. 954.

72. JUDGMENT—Lien—Scire Facias.—The lien of a judgment existing against a decedent at the time of his death need not be revived every five years as against his heirs and devisees.—COLENBURG v. VENTER, Penn., 33 Atl. Rep. 1046.

73. JUDGMENT—Revival.—Where a judgment is reduced in a *scire facias* to revive a joint judgment, without all the parties to the original judgment, or their representatives, if any of them be dead, being made parties to such proceeding, the judgment of revival is insufficient to support an execution issued on it.—ROWLAND v. HARRIS, Tex., 34 S. W. Rep. 295.

74. LIMITATIONS — Adverse Possession.—Where defendant conveyed land to his father, and upon his father's death the land was sold, and a deed thereof, subject to the widow's dower, was executed by the administrator to one from whom plaintiff claimed, the fact that the widow went on the land and occupied the same at defendant's request, and for his benefit, did not cause her possession to inure to defendant's benefit, so as to ripen title in him under the statute of limitations.—EVERETT v. NEWTON, N. Car., 23 S. E. Rep. 961.

75. LIMITATIONS—Proof of Payments on Notes.—On an issue as to whether such payments were made on notes as will prevent their being barred by limitation, it is not incumbent on the plaintiff to prove that payments were made by the debtor with the intention of continuing the notes in force, or reviving them, such intention being presumed from the fact of payment, if proven.—YOUNG v. ALFORD, N. Car., 23 S. E. Rep. 973.

76. MALICIOUS PROSECUTION — Probable Cause.—"Probable cause" means the existence of such facts and circumstances as would excite the belief in a reasonable mind that the plaintiff was guilty of the offense for which he was prosecuted.—MOSLEY v. YEARWOOD, La., 19 South. Rep. 274.

77. MARRIAGE.—A marriage is valid without any certificate of intention being obtained as required by law, when solemnized by a duly authorized magistrate.—CITY OF GARDINER v. INHABITANTS OF MANCHESTER, Me., 33 Atl. Rep. 991.

78. MASTER AND SERVANT—Assumed Risk.—An employee who has equal facilities with his employer for ascertaining the danger incident to labor which he is directed to perform assumes the risk in its performance.—MISSOURI, K. & T. RY. CO. v. SPELLMAN, Tex., 34 S. W. Rep. 298.

79. MASTER AND SERVANT—Assumption of Risk.—In an action for the killing of plaintiff's intestate, where the question of deceased's assumption of a certain risk is to be determined by the facts as to whether defendants were operating a train according to the rules or practices usually adopted by railroad companies, and deceased knew, or ought to have known, that he would incur the risk, expert testimony is inadmissible.—FORDYCE v. LOWMAN, Ark., 34 S. W. Rep. 255.

80. MASTER AND SERVANT—Negligence.—In an action for personal injuries caused by a locomotive to an employee of a railway company, in the company's switch yard, the fact that the locomotive was being operated within a city in a manner in violation of a city ordinance is *prima facie* evidence of negligence.—MISSOURI, K. & T. RY. CO. v. MCGLAMORY, Tex., 34 S. W. Rep. 359.

81. MASTER AND SERVANT—Negligence—Assumption of Risk.—Where a section foreman of twenty-five years' experience, charged with the distribution of ties along a railroad, was injured by the falling against him of ties improperly loaded on the car, on which he took his position to direct the engineer where to have the ties thrown, it is proper to submit the question of whether the danger from the falling of the ties was one of the ordinary risks of his employment, and to charge that if it was he could not recover.—TEXAS CENT. RY. CO. v. LYONS, Tex., 34 S. W. Rep. 362.

82. MASTER AND SERVANT—Negligence of Fellow-servant.—Defendant was a contractor for the erection of a brick building, and employed plaintiff, who was a laborer in attendance upon masons also in defendant's employ. Plaintiff, while engaged in such employment, was injured by the fall of a scaffold constructed by said masons, which fall was due to improper and negligent construction: Held, that the negligence which produced plaintiff's injury was that of his fellow-servants, and his employer was not liable therefor.—MAHER v. MCGRATH, N. J., 33 Atl. Rep. 945.

83. MECHANIC'S LIEN — Amendment. —The amendments of the mechanic's lien authorized by the fourteenth section of the act can be made at any time before judgment on the claim.—DRINKHOUSE v. GREGG MFG. CO., N. J., 33 Atl. Rep. 950.

84. MECHANICS' LIEN—Surety on Contractor's Bond.—A surety on a contractor's bond conditioned for the performance of the contract and the delivery of the building to the obligee free from all charges, liens, mechanic's liens, or other incumbrances, cannot enforce a lien against the property for materials furnished the contractor.—RYND v. PITTSBURG NATATORIUM, Penn., 33 Atl. Rep.1041.

85. MORTGAGE—By What Laws Governed.—A chattel mortgage made in New York by a New York corporation to a creditor of that State, on personalty in Connecticut, is not governed by the laws of New York relative to mortgages given in contemplation of insolvency, the corporation being empowered to do business in Connecticut, its principal business being carried on there, the property mortgaged being machinery in permanent use in its factory in that State, and the mortgage being executed as required by the laws of Connecticut, and being recorded there.—CHILLINGWORTH v. EASTERN TINWARE CO., Conn., 33 Atl. Rep. 1009.

86. MORTGAGES—Sale under Power—Notice.—In an action between the purchaser of the mortgagor's equity of redemption and a purchaser at the trustee's sale under the power for default in payments for an accounting, and to redeem because of the alleged invalidity of the sale under the power, the burden is on the former to show that, at the time of the sale, nothing was due on the mortgage.—MCIVER v. SMITH, N. Car., 23 S. E. Rep. 971.

87. MORTGAGE—Subrogation of Second Mortgagee.—A second mortgagee, making payments on the first mortgage, will, under ordinary circumstances, be subrogated under the first mortgage to the extent of such payments, the residue of the claim of the first mortgagee having priority to the lien acquired by such subrogation.—NEW JERSEY BUILDING, LOAN & INVESTMENT CO. v. CUMBERLAND LAND & IMPROVEMENT CO., N. J., 33 Atl. Rep. 964.

88. MUNICIPAL CORPORATIONS—Additional Territory.—Where a portion of the territory of a municipal corporation is thrown into a new municipality, the right to use, and to regulate the use of, sewers and hydrants within such territory passes to the new government.—INHABITANTS OF TOWNSHIP OF BLOOMFIELD v. MAYOR, ETC. OF BOROUGH OF GLEN RIDGE, N. J., 33 Atl. Rep. 925.

89. MUNICIPAL CORPORATION—Assessment under Unconstitutional Law. — A street improvement having been made, and the assessments of the costs and expense thereof imposed upon certain lands under and according to the provisions of a statute adjudged to be unconstitutional, the court will not proceed further to examine and determine any other objections arising to the proceedings, but will set the assessment aside for

that reason.—STATE v. INHABITANTS OF TOWNSHIP OF VERONA, IN ESSEX COUNTY, N. J., 33 Atl. Rep. 959.

90. MUNICIPAL CORPORATIONS — Change of Grade—Measure of Damages.—The measure of damages for the change of grade of a street by a municipal corporation, to the injury of abutting property, is the difference between the value of the property immediately before, and that immediately after, the change, and it was hence, error to instruct that the jury might award as damages whatever they believed a fair and reasonable sum.—CITY OF DALLAS v. LEAKE, Tex., 34 S. W. Rep. 338.

91. MUNICIPAL CORPORATIONS — Injury to Private Property.—The fact that a municipal corporation was incidentally benefited by the cutting of a ditch through private property by private parties without the consent of the owner did not render it liable in damages therefor.—CITY OF DALLAS v. BEEMAN, Tex., 34 S. W. Rep. 340.

92. MUNICIPAL CORPORATIONS—Ordinance.—Code, § 3802, authorizing town commissioners to pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens, and *Id.* § 3804, authorizing them to enforce ordinances by imposing penalties, do not authorize an ordinance prohibiting, under penalty, the importation into a town of any second-hand clothing or furniture for purposes of sale, since its prohibits a business lawful in itself.—STATE v. TAFT, N. Car., 23 S. E. Rep. 970.

93. NATURALIZATION.—There is no provision of the federal constitution which requires the courts or judges of a State to perform any duties respecting the admissions of aliens to citizenship.—IN RE GILROY, Me., 33 Atl. Rep. 979.

94. NEGOTIABLE INSTRUMENT—Note—Transfer of Part Interest.—Separate actions cannot be maintained by different indorsees of part interest in the same note; and ancillary proceedings in such actions, such as writs of sequestration for property covered by a chattel mortgage securing the note are void.—AVERY v. POPPER, Tex., 34 S. W. Rep. 325.

95. NEGOTIABLE INSTRUMENT — Parol Evidence — Stock Certificate.—In an action by a corporation, on a note alleged to have been given by defendant in payment for stock for which a certificate was issued to defendant, parol evidence was admissible to show that the note was accommodation paper, and that the stock was issued to secure it, merely.—LOAN STAR LEATHER CO. v. CITY NAT. BANK OF TYLER, Tex., 34 S. W. Rep. 297.

96. PARTY WALLS — Contract. — Where a party-wall contract, making one-half the cost of the wall erected by one of the parties a lien on the lot of the other party, is filed for record in the office of the county clerk, the facts that it is recorded in the records of deeds, instead of in the record of mortgages, and that after being so recorded it was returned to the builder of the wall, do not affect the constructive notice to purchasers of the lot on which the lien exists.—KNOWLES v. OTT, Tex., 34 S. W. Rep. 295.

97. PRINCIPAL AND AGENT—Powers of Agents.—An agent has no power to accept a discharge of his own individual liability in satisfaction of a debt due his principal from a third person.—CHATTANOOGA FOUNDRY & PIPE WORKS v. GORMAN, Tex., 34 S. W. Rep. 308.

98. PUBLIC LANDS — Trespass — Cutting Timber. — Where lands granted to a State to aid in railroad construction have become forfeitable to the United States for non-performance of conditions subsequent, the unauthorized cutting of timber therefrom gives the government no right of action, unless, before the cutting, it has actually declared a forfeiture, and reinvested itself with the title; otherwise, the cause of action is in the State, and remains therein, notwithstanding a subsequent declaration of forfeiture by congress.—UNITED STATES v. LOUGHREY, U. S. C. C. of App., 71 Fed. Rep. 921.

99. RAILROAD COMPANY—Charter Powers—Relocation of Line.—The charter of a railroad company, containing power of eminent domain, declared the purpose of the corporation to be the construction of a line through and across the State, authorized a survey to determine the most advantageous route, and the laying out and construction of the road, and required the corporation to file a map showing the route as soon as it was located: Held that, after filing a map showing the location of its line, the company had no authority, under its charter, to change or relocate its line.—LUSBY v. KANSAS CITY, M. & B. R. CO., Miss., 19 South. Rep. 239.

100. RAILROAD COMPANIES—Municipal Corporations—Occupation Tax.—Where a railroad company owns and operates two connecting lines, under individual names, but under one management, and having but one agent in a city into which both run, where, for convenience of the public, more than one depot is maintained, the company is liable for one occupation tax only, under the city's ordinance requiring every corporation to pay a special license tax for carrying on business.—SOUTHERN RY. CO. v. CITY COUNCIL OF GREENVILLE, S. Car., 23 S. E. Rep. 952.

101. RAILROAD COMPANY — Negligence — Steer Running at Large.—Where a steer, which, owing to its crippled condition, has been removed by a railroad company from a car to be killed, is allowed to recover, and, in an apparently vigorous condition, roam around the railroad yard, which is open to the public, without an attempt to control it, the company is liable for one injured by the steer while passing through the yard.—TEXAS & P. RY. CO. v. JUNEMAN, U. S. C. C. of App., 71 Fed. Rep. 939.

102. RAILROAD COMPANY—Street Railway—Injuries to Child.—In an action for injuries to a child, caused by a street car, where there is testimony that the motorman, at the time of the accident, failed to see plaintiff because he was looking in another direction, at persons assembled at the side of the street, and there is no question of contributory negligence, the case cannot be withdrawn from the jury.—HARKINS v. PITTSBURGH, A. & M. TRACTION CO., Penn., 33 Atl. Rep. 1045.

103. RAILROAD COMPANIES—Surface Water.—A railroad company is not liable in damages for causing surface water to flow upon the land of another by means of a ditch when it does not cause any greater flow thereon than there was before the construction of the road; and the fact that the road has been maintained for eight years without the ditch does not give the landowner a right to its continuance in that condition.—MISSOURI, K. & T. RY. CO. OF TEXAS v. BISHOP, Tex., 34 S. W. Rep. 323.

104. REMOVAL OF CAUSES — Appearance.—An action was commenced against a New York corporation, in a Tennessee State court, by service on one M, "as agent and adjuster" for such corporation. The defendant filed its petition for the removal of the cause to the federal court, without in any way limiting the effect of its appearance in so doing, and afterwards filed a plea in abatement on the ground that M was not its agent: Held, that the question whether the defendant, by filing its petition for removal, unaccompanied by a plea in abatement, and without restricting the purpose of its appearance, waived the objection to the jurisdiction of the court for want of service, should be certified to the supreme court.—NATIONAL ACC. SOC. v. SPIRO, U. S. C. C. of App., 71 Fed. Rep. 897.

105. SALE—Conditional Sale — Resale.—Plaintiff sold buggies to C, who was conducting the business of a livery and sales stable, including the sale of carriages and buggies: Held that, they not only being presumptively sold to C for resale, but the contract between plaintiff and C having expressly authorized a resale, defendant, who purchased them from C without knowledge that C was not the absolute owner, obtained a good title, though the contract of sale from

plaintiff to C provided that title should remain in plaintiff till it was fully paid.—COLUMBUS BUGGY CO. v. TURLEY, Miss., 19 South. Rep. 232.

106. SALE—Evidence—Declarations of Agent.—Under Gen. St. § 1041, providing that in all actions for a book debt the entries of the parties in their books are admissible, and Practice Act, § 31, making them admissible in all actions for the recovery of a book debt, an account book kept by the plaintiff in an action for goods sold and delivered is admissible, not only to show that the goods charged to defendant therein were sold, but were sold to him.—PLUMB v. CURTIS, Conn., 33 Atl. Rep. 998.

107. SALES—Fraud—Rescission.—In an action to rescind a sale for fraud, if appeared that the buyer, at the time of the sale, held himself out as the owner of a business which he was in fact conducting for one H, to protect the property from the creditors of H, and that his assets exceeded his liabilities, which was false: Held, that there was such fraud as warranted a rescission of the sale by the seller.—ABILENE MILL & ELEVATOR CO. v. FINLEY, Tex., 34 S. W. Rep. 311.

108. SALE — Warranty — Special Damages.—Where a harvester is sold under a warranty that it will bind the grain into smooth bundles, and save it well, the purchaser, in an action on the warranty, may plead and prove, as special damages, the waste and loss of grain from imperfect binding.—D. M. OSBORNE & CO. v. POINDEXTER, Tex., 34 S. W. Rep. 301.

109. TAXATION.—A corporation may exist under and by virtue of the purchase at a receiver's sale of the charter of another corporation, and the legislative recognition and the assumption of the State that it is a corporation, and yet not have any right to an exemption from taxation granted to the other corporation, because it is not, in law or in fact, the same.—MERCANTILE BANK v. STATE OF TENNESSEE, U. S. S. C., 16 S. C. Rep. 462.

110. TAXATION—Bank—Exemption—Shares of Stock.—A bank's charter, granted by the State of Tennessee in 1856, provided that the bank should "have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the State for taxes; and shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes:" Held, that this charter tax was not on the capital stock, but was on the shares of stock, which were consequently not subject to further taxation.—BANK OF COMMERCE v. STATE OF TENNESSEE, U. S. S. C., 16 S. C. Rep. 456.

111. TAXATION — Corporate Charter.—Act Tenn. March 30, 1860, granted to the D Ins. Co. "all the rights, privileges, and immunities" of the B Ins. Co. Act Tenn. March 11, 1867, incorporating the W Ins. Co., gave it "all the rights and privileges" of the D Co.: Held, that the immunity from taxation granted to the two former companies did not pass to the W Co.—PŒNIX FIRE & MARINE INS. CO. OF MEMPHIS v. STATE OF TENNESSEE, U. S. S. C., 16 S. C. Rep. 471.

112. TAXATION—Exemptions.—A graveyard is not exempt from special assessments for local improvements.—BOROUGH OF BELTZHOOVER v. HEIRS OF BELTZHOOVER, Penn., 33 Atl. Rep. 1047.

113. TAXATION — Privilege Tax—Effect on Validity of Contract.—Under Code 1880, § 583 (Code 1892, § 3401), providing that all contracts made with a person who shall violate the law requiring payment of privilege tax, in reference to the business carried on in disregard of such law, shall be null and void so far only as such person may base any claim on them, and no suit shall be maintainable in favor of such person on any such contract, one secured by second deed of trust cannot object to sale under the first deed of trust on the ground that the person secured thereby had not paid his privilege tax; the validity of the deed of trust not being questioned by the one who gave it.—CUNNINGHAM BROS. WOOLEN CO. v. ATLANTIC NAT. BUILDING & LOAN ASS'N., Miss., 19 South. Rep. 234.

114. TOWNS—Liability for Torts of Officers.—A town is not liable for the torts of its selectmen in building a road, when there is no vote authorizing them to take charge of that work.—GODDARD v. INHABITANTS OF HARPSWELL, Me., 33 Atl. Rep. 980.

115. TOWNSHIP — Defective Bridge — Remote and Proximate Cause.—While crossing a bridge 12 feet wide and 14 feet long, plaintiff dropped her hat from the buggy, and, after having passed 14 feet beyond the bridge, the driver stopped to get the hat, giving the reins to plaintiff's older sister. The horse then took fright, and backed the buggy on the bridge, and off one side thereof: Held, that the negligence of the township in not maintaining guard rails on the bridge was the proximate cause of the injuries received by plaintiff, the possibility of a horse taking fright being something which the township was bound to guard against.—YODERS v. TOWNSHIP OF AMWELL, Penn., 33 Atl. Rep. 1017.

116. TRUST—Equity Jurisdiction.—Where real estate situated in this State has been conveyed by deed in trust, held, that the trust is within the equity jurisdiction of this court, and may be dealt with regardless of the residence of the parties in interest. When the trustee under the conveyance voluntarily submits himself to the jurisdiction of the court, both the *res* and the title to it are in court.—DU PUY v. STANDARD MINERAL CO., Me., 33 Atl. Rep. 976.

117. VENDOR'S LIEN — Enforcement.—The failure of the holder of a note secured by vendor's lien to present his claim against the estate of a decedent who purchased the land from the vendee does not defeat the holder's right to enforce the lien against the land.—STRAIN v. WALTON, Tex., 34 S. W. Rep. 293.

118. SALE OF LAND — Existing Incumbrances.—A survey on the ground made by a company invested with the power of eminent domain, followed by selection and proper adoption of a line for the proposed road, fastens a burden upon the property sufficient to relieve a vendee from his contract to purchase free of incumbrances.—JOHNSTON v. CALLERY, Penn., 33 Atl. Rep. 1036.

119. WILL—Life Estate—Fee-simple.—The act of 1833 provided that all devises of real estate shall pass the whole estate of the testator in the premises devised, unless it appear by the will that the testator intended to devise a less estate: Held, that a will giving the husband of testatrix the "whole income while he lives," and also granting him an unlimited power of sale of all her property, with no restriction on the appropriation of the proceeds, gave him, in effect, a fee-simple.—KIEFFEL v. KEPPLER, Penn., 33 Atl. Rep. 1043.

120. WILL—Nature of Estate.—Testator directed that the share of each child should be given him when he came of age or married. A clause provided that if the executor should sell testator's estate before the marriage or coming of age of either of the children, they should, on attaining their majority or marrying, be paid their distributive interest; and that "the portion that either of my daughters, may be entitled to, I give to her during the term of her natural life, and at her death, I give and bequeath the same to such issue of her body" as may then be living. Another clause declared that the portion of testator's son should go to him, "absolutely free and discharged from all limitations and restrictions whatsoever:" Held that, whether the estate was divided with or without a sale, the daughters were to have only a life interest in their portions, with remainder to their surviving issue in fee-simple.—WOOD v. WOOD, S. Car., 23 S. E. Rep. 950.

121. WILLS — Revocation of Legacy.—The testator had bequeathed a promissory note to certain legatees named. The note, after the date of the will, was collected, at the instance of the testator, and the amount placed to his credit. The legacy was of a note, and not of a sum of money. There was a revocation of the legacy.—SUCCESSION OF BATCHELOR, La., 19 South. Rep. 283.